



Opinion No. 609, August 2011

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer who is an employee of an insurance company and who represents persons insured by the company with respect to claims covered by liability insurance policies issued by the company share an office with a non-lawyer insurance adjuster, who is employed by the insurance company to handle on behalf of the company questions regarding coverage in particular cases under company insurance policies?

Statement of Facts

A lawyer is an employee of an insurance company. A major part of the job of the lawyer is to provide representation to persons insured by the insurance company who are being sued on claims that appear to be covered by liability insurance policies issued by the insurance company. The lawyer shares office space with a non-lawyer insurance adjuster, who is also an employee of the insurance company and who handles on behalf of the insurance company issues concerning the extent of the coverage that is applicable under company insurance policies in the circumstances of particular insured persons. Part of the role of the insurance adjuster is to be prepared to question the extent to which particular claims asserted against insured persons are actually covered by liability policies issued by the insurance company. Some of the matters for which the lawyer provides representation are matters that are subject to evaluation by the insurance adjuster as to whether and to what extent a company-issued insurance policy provides coverage for the matter.

Discussion

The Texas Disciplinary Rules of Professional Conduct and Texas statutory law do not prohibit a lawyer who is an employee of an insurance company from representing a person insured by the insurance company so long as the interest of the insured and the interest of the insurance company are congruent. See *Unauthorized Practice of Law Committee v. American Home Insurance Co., Inc.*, 261 S.W.3d 24, 26–27 (Tex. 2008). “[W]e have never held that an insurance

defense lawyer *cannot* represent both the insurer and the insured, only that the lawyer *must* represent the insured and protect his interests from compromise by the insurer.” 261 S.W.3d at 42 (emphasis in original). As is true in the case of any client, the lawyer in this situation owes his client, the insured, unqualified loyalty. 261 S.W.3d at 41. In addition, since the lawyer will have obligations as a lawyer both to the insured and to the insurance company, there will exist the risk that conflicts of interest may arise where, under Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, it may be impossible for the lawyer to continue to represent the insured.

The Texas Disciplinary Rules of Professional Conduct do not specifically prohibit a lawyer from sharing office space with a non-lawyer. However, a lawyer sharing office space with a person who is not a part of the lawyer’s law firm is required to comply with all requirements of the Texas Disciplinary Rules, including the requirements of Rule 1.05 concerning the protection of a client’s confidential information. See Professional Ethics Committee Opinion 493 (February 1994). In view of the lawyer’s duties under Rule 1.05 not to disclose a client’s confidential information or to use such information adversely to the client’s interests, the lawyer in these circumstances is obligated to take all reasonable steps necessary to protect each client’s confidential information so that no confidential information of a client is available to the insurance adjuster or to anyone else not working for the lawyer who will have access to the shared office

space or equipment, including computer systems, used by the lawyer. Such steps should include, as necessary, restricting access to client files, computers, electronically stored information, printers, telephones, fax machines, and copiers. In addition, members of the lawyer’s staff should be trained and instructed to protect client confidences. Sharing confidential information with non-lawyer office staff, such as a receptionist or secretary, will be permissible only if the lawyer has taken effective steps to ensure that all confidential information of each client is protected from transmission to any person other than the lawyer and persons acting on behalf of the lawyer. In this regard, Rule 5.03(a) requires that a lawyer having direct supervisory authority over non-lawyer assistants make reasonable efforts to ensure that the assistants’ conduct is compatible with the professional obligations of the lawyer.

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, it is permissible for a lawyer who is an employee of an insurance company and who represents persons insured by the company with respect to claims covered by liability insurance policies issued by the company to share an office with a non-lawyer insurance adjuster, who is employed by the insurance company to handle on behalf of the company questions regarding coverage in particular cases under company insurance policies, provided that the lawyer takes appropriate steps to protect the confidential information of all clients represented by the lawyer. ✪



Opinion No. 610, August 2011

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is a lawyer permitted to acquire, by agreement with his client, a security interest in the subject matter of litigation that the lawyer is conducting for the client in order to secure payment of the lawyer's fee with respect to the litigation?

Statement of Facts

A lawyer and the lawyer's client enter into a contingent fee agreement with respect to a litigation matter being handled by the lawyer, which provides for the client to grant to the lawyer, as a means of securing payment of the fee due to the lawyer in the matter, a security interest in the cause of action that is the subject of the litigation. The cause of action relates to a claim for damages arising from an injury sustained by the client.

Discussion

The facts considered in this case relate to a lawyer's acquisition of one type of proprietary interest — a security interest — in a matter that the lawyer is handling for his client. Rule 1.08(h) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from acquiring a proprietary interest in a cause of action or subject matter of litigation that the lawyer is handling for a client, with two limited exceptions:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the

lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

Thus under Rule 1.08(h), a lawyer may not acquire a security interest or other proprietary interest in a matter being handled by the lawyer unless the particular proprietary interest is either a contingent fee permitted under Rule 1.04 or "a lien granted by law to secure the lawyer's fee or expenses."

Comment 7 to Rule 1.08 explains the underlying philosophy of Rule 1.08 as follows:

This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed

in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d) [of Rule 1.08].

Although the fee agreement between the lawyer and the client provides for a contingent fee for the services to be provided in the litigation matter, the contingent fee and the security interest are two different types of proprietary interest in the client's litigation matter. A security interest in a litigation matter is not an essential part of a contingent fee agreement that is permitted under Rule 1.04, and the fact that a contingent fee is permissible does not make a security interest to secure such a fee also permissible. The security interest must itself satisfy the requirements of Rule 1.08(h).

Since a security interest to secure a contingent fee is not itself a contingent fee, the security interest here considered will be permissible under Rule 1.08(h) only if the security interest qualifies as "a

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lien granted by law to secure the lawyer's fee or expenses." Under Texas law, there is no general statutory attorney's lien but a lawyer has a right to claim a common law possessory lien against a client's property, money, and papers for the payment of amounts due the lawyer for services and expenses. See Professional Ethics Committee Opinion 395 (May 1979, corrected June 1980) and Opinion 411 (January 1984). A leading Texas case on the attorney's lien under Texas common law is the decision of the Supreme Court of Texas in *Thomson v. Findlater Hardware Co.*, 205 S.W. 831, 109 Tex. 235 (Tex. 1918), which recognized (quoting *Mechem on Agency*) that "[a]n attorney has a general lien upon all the papers, deeds, vouchers, and other documents of his client, which come into the possession of the attorney while he is acting for his client in a professional capacity." 205

S.W. at 832, 109 Tex. at 237. It should be noted that this lien on a client's documents is subject to the important limitation set forth in Rule 1.15(d) of the Texas Disciplinary Rules of Professional Conduct that a lawyer "may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation."

In the circumstances considered in this opinion, the proposed security interest is not an attorney's lien granted under Texas law within the meaning of Rule 1.08(h)(1). Instead the proposed security interest is to be created by contractual agreement between the lawyer and his client. The proposed security interest is thus a proprietary interest in a litigation matter being handled by the lawyer who is seeking to acquire the security interest, but this security interest is not within the

scope of the exceptions stated in Rule 1.08(h). Accordingly, under Rule 1.08(h), acquisition by the lawyer of the proposed security interest is prohibited.

Conclusion

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer representing a client in litigation may not acquire, by agreement with his client, a lien upon the subject matter of the litigation as a means of securing payment of the lawyer's fee with respect to the litigation. ❖

The Supreme Court of Texas appoints the nine members of the Professional Ethics Committee for the State Bar of Texas from members of the bar and the judiciary. The Court also appoints the committee's chair. According to Section 81.092(c) of the Texas Government Code, "Committee opinions are not binding on the supreme court."



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